COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts	DTE 01-31- Phase I

MOTION OF AT&T FOR CLARIFICATION ON THE SCOPE OF THE MAY 8, 2002, PHASE I ORDER AND THE SCOPE OF PHASE II

Introduction

AT&T Communications of New England, Inc. ("AT&T") moves for clarification of the Order issued by the Department of Telecommunications and Energy ("Department") on May 8, 2002. In its Phase I Order, the Department used the extensive record that was developed in Phase I efficiently to address and decide particular issues originally identified as issues for Phase II, namely implementation of a price floor and reduction of access rates. By this motion, AT&T seeks clarification and confirmation that the Department's silence on other issues potentially scheduled for Phase II (for example, universal service funding, and the elimination of Verizon's UNE use restrictions and prohibition against commingling) does not constitute a ruling that such issues will not be considered for investigation in Phase II of the proceeding.

Specifically, AT&T seeks clarification that the Phase I Order does not deny with prejudice any relief relating to the above-mentioned issues simply because those issues were not addressed in the Phase I Order.

Background

In its June 21, 2001 Interlocutory Order on Scope ("Scope Order"), the Department noted the list of issues that the parties had requested the Department address in this proceeding. The Department listed the following:

> (1) a full rate case or an extensive review of Verizon's past and projected financial information;
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> (2) establishment of imputation-based price floors;
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> (3) coordination of the relationship between wholesale and retail rates and the respective ongoing Department proceedings;
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> (4) development of a universal service funding mechanism;
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> (5) access pricing reform;
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> (6) expansion of competitive safeguards;
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> (7) review of alternative proposals to Verizon's plan; and
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> (8) an investigation into the state of competition in Massachusetts.

The Department went on, in its Scope Order, to bifurcate this proceeding. It concluded that the first phase of this proceeding will address the issue of whether there is sufficient competition to justify the pricing flexibility that Verizon seeks. *Id*. at 17. Further, it stated that "[a]t the start of the second phase, the Department will address whether the additional categories that intervenors have argued should be included in the scope of this proceeding (*e.g.* universal service funding, price floors, access reform, a full rate case or earnings review, etc.) will be part of the second phase." *Id*. at 18.

In its Phase I investigation of competition, the Department determined that in general there is sufficient competition at the retail level to justify retail pricing flexibility in the retail markets in which Verizon's rivals can compete by acquiring UNEs from Verizon at wholesale. *Id*., at 92. The Department determined that retail competition is sufficient in those markets

because Verizon's competitors can obtain from Verizon the inputs they need to compete at costs and provisioning quality that are comparable to the costs and provisioning quality that Verizon enjoys (*id*., at 60), provided that Verizon is not permitted to price those retail services below the cost of the UNEs necessary to provide them plus a mark-up for Verizon's retailing costs as reflected in the wholesale discount. *Id*. at 92. Moreover, the Department found that, in those markets that are not contestable using UNEs, there is not sufficient competition to justify pricing flexibility in the absence of further conditions and safeguards necessary to ensure that Verizon's rivals can obtain the inputs they need to compete at costs and provisioning quality comparable to Verizon's. *Id*., at 61-62.

Based on the Phase I record, the Department was able to determine and require the establishment of some of those conditions before pricing flexibility is granted. In particular, the Department found that because private line services are not contestable using UNEs, Verizon shall not be granted pricing flexibility for those services until it lowers the price for the inputs that its rivals need to compete in that retail market to UNE prices, that is, until Verizon lowers its special access prices to TELRIC levels. *See id*., at 92 ("Verizon may, consistent with G.L. c. 159, be granted pricing flexibility with regard to private line services, *but only after rates for special access services are moved to UNE-based levels*.") (emphasis supplied). With respect to provisioning quality, the Department recognized that parity in the provisioning of wholesale inputs is necessary to effective competition in the downstream, retail market for private line services. The Department noted its investigation in D.T.E. 01-34 of allegations of unreasonable provisioning of the upstream, wholesale input (*i.e*., special access services) for private line services and stated its intent to remedy that problem if it is found to exist. *Id*., at 65.

Argument.

I. STANDARD OF REVIEW

In *Boston Gas Company*, D.P.U. 96-50-C (Phase I) (May 16, 1997), the Department reiterated its standard of review for motions for clarification. The Department stated:

> Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. *Boston Edison Company*, D.P.U. 92-1A-B at 4 (1993); *Whitinsville Water Company*, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. *Boston Edison Company*, D.P.U. 90-335-A at 3 (1992), citing *Fitchburg Gas & Electric Light Company*, D.P.U. 18296/18297, at 2 (1976).

Id., at 14.

II. THE DEPARTMENT SHOULD CLARIFY THAT, IN ACCORDANCE WITH ITS SCOPE ORDER, THE PHASE I ORDER IS NOT INTENDED TO RESOLVE ALL ISSUES THAT MUST BE ADDRESSED TO ESTABLISH THE CONDITIONS NECESSARY FOR VERIZON'S PRICING FLEXIBILITY TO RESULT IN JUST AND REASONABLE RATES, AND THAT THE REMAINING ISSUES ARE SUBJECT TO CONSIDERATION IN PHASE II.

The Department's Phase I Order appropriately recognizes the necessity of getting the conditions for efficient competition right in order for Verizon pricing flexibility to produce just and reasonable rates. The Department found that, if competitors are paying above cost for the inputs necessary to compete, whatever the level of competition that is observed, it cannot be efficient competition that can move retail prices to cost. The Department also recognized that, if competitors cannot obtain the inputs at provisioning parity with Verizon, whatever the level of competition that is observed, it cannot be efficient competition that can move retail prices to cost. In its Scope Order, the Department had reserved Phase II to address the parity of access to wholesale inputs and other conditions necessary to ensure efficient competition.

AT&T requests that the Department clarify that its willingness to address some of the conditions necessary for efficient competition in Phase I does not constitute a ruling that the

Department will not address other important conditions in Phase II. Understanding that the Department intended to reserve these issues for Phase II, AT&T refrained from presenting comprehensive evidence and argument on how these remaining issues impact competition. AT&T respectfully requests clarification that these issues will be investigated in Phase II, or at a minimum that the parties be given an opportunity to present evidence and argument on them before the Department reaches a final decision on whether they will be addressed in Phase II.

A. The Absence of The Issue Of UNE Use Restrictions From The Phase I Order Does Not Constitute A Ruling That It Will Not Be Considered in Phase II.

In its Scope Order, the Department identified the "relationship between wholesale and retail rates" as among the potential issues to be considered in Phase II. In general, the relationship between wholesale and retail rates for most retail services will involve a comparison between Verizon's retail rates and the rates of the UNEs needed to provide the comparable retail service. In the case of retail private line services, however, a comparison between UNE rates and retail rates is not necessarily relevant, because Verizon prevents its competitors from obtaining UNEs to compete in the private line retail market. *See*, Phase I Order, at 61 (CLECs must use special access services instead of UNEs to compete in the private line market). *See also*, Exh. ATT-3 (August 24, 2001 Waldbaum Testimony); AT&T Initial Brief, at 26-33. Thus, establishing the proper relationship between retail and wholesale rates in the market for private line services can be addressed most efficiently by requiring Verizon to provide UNEs as wholesale inputs in the market for private line services.

Although the Department's decision to grant pricing flexibility to Verizon in the private line market on the condition that Verizon price its wholesale inputs (special access) at TELRIC addresses part of the problem, it does not address the entire problem. It ensures that both Verizon and its rivals face the same economic cost for the wholesale input; however, it does not address

the problem that Verizon has every incentive to discriminate against its competitors in the provisioning of the wholesale input. *See*, Phase 1 Order (The Department acknowledges that, as a vertically integrated firm, Verizon has an incentive to discriminate in the provisioning and maintenance of wholesale services."). While the Department has expressed a willingness to consider a performance assurance plan for special access provisioning, such effort would not be needed if the Department merely required Verizon to offer the wholesale inputs for private lines services as UNEs rather than as special access.

Thus, in order to establish the *wholesale* conditions necessary to ensure efficient competition in the *retail* market, it still remains for the Department to consider in Phase II the restrictions that Verizon places on the use of UNEs, which preclude their use by Verizon's competitors in the private line market. Phase II should involve a full investigation of the legal and factual considerations relating to the removal of Verizon's UNE use restrictions, including the authority of the Department to do so, and the detrimental effect on competition and retail rates in Massachusetts that would result from leaving them in place. If, contrary to AT&T's recommendation, the Department were to decide that some type of UNE use restrictions should remain in place, Phase II could also include the consideration of UNE use restrictions that can – unlike the present use restrictions – be satisfied from a technical point of view.[1]

The Department has already recognized that the treatment of wholesale inputs in a "special access" regulatory environment is an artifact of a regulatory regime that predates the

[1] As Ms. Waldbaum explained in her testimony, Verizon's current UNE use restrictions have the practical effect of prohibiting the use of UNEs in all instances involving private line services, because none of the three "safe harbor" options can be satisfied. They cannot be satisfied because, under the first option, CLECs must require customers to enter into exclusive contracts (which is commercially untenable) and, under the second two options, CLECs must measure usage at the customer premises, where no measurement facilities exist. *See*, Exh. ATT-3 (August 24, 2001 Waldbaum Testimony), pp. 8-11. Ms. Walbaum's testimony stands unchallenged by Verizon in this case.

Telecommunications Act of 1996. Phase I Order, at 63-63. Moreover, it recognized that the treatment of wholesale inputs as "special access" is incompatible with efficient competition at the retail level. *Id.* The economic reasoning reflected in the Phase I Order is sound and unassailable: efficient competition at the retail level requires that Verizon's retail competitors have access to network facilities on the same terms and conditions as Verizon. When Verizon provides private line services to retail customers, it incurs only the incremental cost of the network facilities necessary to serve the customer. Verizon's competitors cannot compete efficiently if Verizon charges them a greater cost. Moreover, when Verizon provides private line services to its retail customers, it takes advantage of the provisioning processes it has developed for its own use. Verizon's retail competitors cannot compete efficiently with Verizon unless Verizon provisions network facilities on terms that are comparable.

In Phase II, the Department should complete the logic of its sound reasoning in Phase I. The simplest and most effective means for ensuring that Verizon's competitors obtain network facilities on the same terms and conditions as Verizon for purposes of local competition is to treat them as unbundled network elements under the Telecommunications Act of 1996, not as "special access" circuits under a pre-existing regulatory regime. Indeed, that is the fair and logical result of the record in Phase I: In its Massachusetts Competitive Profile ("MCP") Verizon relied on lines provisioned over special access circuits as evidence of "local exchange competition" and obtained pricing flexibility on that basis. If such lines are to be considered local exchange competition for purposes of granting Verizon pricing flexibility, then such lines should be considered local exchange lines for purposes of UNE pricing.

Moreover, in such an investigation, the Department could take advantage of the considerable effort that the New York Public Service Commission ("NYPSC") has already

devoted to this issue. In New York, although the NYPSC established restrictions on the use of EELs intended to ensure that they are used "to transmit primarily local exchange traffic," it established a test that can be satisfied as a practical and administrative matter. Order Denying Rehearing and Clarifying Primarily Local Traffic Standard (Issued and Effective August 10, 1999) (the "Primarily Local Traffic Standard Order"), at 11. The NYPSC stated:

> In order to qualify for the EEL rate, a rate more favorable than the special access rate, the March 24 Order requires that EELs at and above the DS1 or T-1 level must be used to transmit primarily local exchange traffic. The primarily local standard will consist of a channel count test at the transport and loop level. When some local traffic is carried on 50% or more of DS1 level and above loop channels that are connected to a transport facility, the transport will qualify for EEL rates as will the loops, to the extent loops service customers whose local needs are being satisfied by the EEL circuit. If the primarily local standard for transport is not met, then the EEL rates would apply only to those loops meeting the standard; i.e. for loops of DS1 level and above, some local traffic must be carried on 50% of the channels on the loop circuit.

Id. Thus defined, the New York local usage definition is simple and implementable. It requires some local traffic on 50% or more of DS1 loop channels, but it does not require the CLEC or the customer to measure the quantity of such usage. This test can be satisfied in many cases because carriers such as AT&T do not segregate T1.5 channels. Hence, if the customer is purchasing local service from AT&T on this circuit, all of the channels will have some local tariff.

In summary, the Department's Scope Order contemplated the consideration of additional issues relating to the conditions necessary for the grant of pricing flexibility to Verizon to produce just and reasonable rates. The ability of CLECs to obtain UNEs to provide private line services is an essential condition for Verizon pricing flexibility to produce just and reasonable rates in the retail private line market. The Department should clarify that its silence regarding this issue in the Phase I decision does not constitute a ruling that it will not consider it in Phase II.

B. The Department's Phase I Order Is Silent Regarding the Elimination of Verizon's Prohibition on Co-Mingling.

Similarly, in its Phase I Order, the Department does address the issue of Verizon's prohibition on co-mingling. AT&T raised the anti-competitive effect of this prohibition on co-mingling in the rebuttal testimony of Anthony Fea. As explained by Mr. Fea, Verizon prohibits mixing of access services and UNEs on the same facilities. This ban on co-mingling presents a significant impediment to CLECs' ability to attain network efficiencies when they cannot build their own facilities. *See* Exh. ATT-6 (August 24, 2001 Fea Testimony). AT&T seeks clarification that the Department's silence on this issue in the Phase I Order is not a ruling that that AT&T is precluded from raising Verizon's prohibition on co-mingling in the Phase II investigation of the appropriate regulatory treatment of Verizon.

C. The Department's Phase I Order Is Does Not Expressly Address the Issue of Universal Service Funding.

In its Comments on Scope submitted on May 23, 2001, AT&T requested that the Department investigate implementation of the competitively-neutral universal service funding mechanism promised in *Local Competition Order – D.* Specifically, AT&T stated:

> As the Department correctly recognized, a competitively neutral universal service funding mechanism could mitigate any adverse universal service consequences of adopting the economically efficient rate structure for Verizon that a proper price floor would necessitate. At the same time, it would not undermine the beneficial effects of an economically efficient rate structure on the development of facilities based competition. Implementing such a plan would require the explicit identification of the amount and the source of the cross subsidy that Verizon provides for universal service purposes. Such amounts could then, for example, be removed from the source retail rates (*e.g.*, access rates) and the residential rates adjusted upward commensurately. Under this illustrative example, Verizon (and all other carriers) could be required to pay into a universal service fund. All carriers could seek to recover such costs from *competitive retail* services where the market would permit. The monies in the universal service fund could then be available *to every carrier* that provides residential retail service in proportion to its number of residential

> customers. In other words, there is an explicit, visible subsidy that moves with the customer when the customer moves to the carrier of her choice.
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> The foregoing suggestion is not intended to be a definitive proposal. It is, in fact, what the Department was essentially describing as its intent in *Local Competition Order – D.* The Department should in this docket undertake an investigation that will lead to a result that is consistent both with universal service principles and with principles of economically efficient rate design that will permit the development of competition.

Comments of AT&T Regarding Scope of the Proceeding, D.T.E. 01-31 (May 23, 2001), at 21-22.

The Department's Phase I Order does not mention expressly the issue of universal service funding. However, that order does discuss a larger and related issue, that is, the relationship between wholesale and retail rates. The Department stated:

> In order to ensure that the rates at which Verizon's basic residential services [are set] facilitate efficient facilities-based and UNE-based competition for those services, the Department will undertake, after the Phase II filing, a further investigation to compare UNE rates to Verizon's residential retail rates. If we conclude that retail rates are below UNE costs, and, thus, impede efficient competition for those services, we will take the appropriate steps to remedy the inefficiency.

Phase I Order, at 103. AT&T respectfully submits that once the Department completes its investigation of the wholesale/retail rate comparison and implements its findings on the appropriate steps to remedy the inefficiency, Phase II should continue with an investigation into the implementation of a competitively neutral universal service system. AT&T applauds the Department's recognition of the need to square the public's need for universal service with the need to promote efficient facilities-based competition for residential services.

Conclusion

In regard to the issues of UNE use restrictions, Verizon's prohibition on co-mingling, and universal service funding, AT&T seeks clarification that the scope of the Department's Phase I Order issued on May 8, 2002, does not preclude these issues from being raised and investigated

in Phase II of the docket. Further, AT&T requests that the Department provide an opportunity to the parties to comment on the proper scope of Phase II.

Respectfully submitted,

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